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FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 92-348

In the matter of)

Motorola Satellite)
Communications, Inc.)

ET Docket No. 92-28 ✓
PP-32

Request for Pioneer's)
Preference to Establish A Low-)
Earth Orbit Satellite System)
in the 1610-1626.5 MHz Band)

In the matters of)

Ellipsat Corp.; TRW Inc.;)
Constellation Communications,)
Inc.)

FOIA Control Nos. 92-83,
92-88, 92-86

On Request for Inspection)
of Records)

MEMORANDUM OPINION AND ORDER

Adopted: July 24, 1992; Released: July 27, 1992

By the Commission:

1. The Commission has before it an Application for Review of Protective Order filed on June 12, 1992 by AMSC Subsidiary Corporation ("AMSC"), an Opposition to it filed on June 26, 1992 by Motorola Satellite Communications, Inc. ("Motorola"), and AMSC's Reply filed July 9, 1992. AMSC seeks review of a Protective Order, DA 92-674, FOIA Control Nos. 92-83, 92-88, 92-86 (May 28, 1992) ("Protective Order"), adopted by the Office of Engineering and Technology ("OET"), limiting access to certain materials submitted by Motorola in ET Docket No. 92-28, PP-32 ("large LEO proceeding"). For the reasons discussed below, we deny the Application for Review.

BACKGROUND

2. On April 10, 1992, Motorola requested confidential treatment, pursuant to Sections 0.457(d) and 0.459 of the Commission's Rules, of certain materials submitted to the Commission in support of its request for a pioneer's preference in the large LEO proceeding. Motorola's request for confidential treatment was served on all applicants and participants in the

large LEO proceeding (including AMSC). In response, three other applicants for pioneer's preferences in the large LEO proceeding - Ellipsat Corp., TRW Inc. and Constellation Communications, Inc. -- filed oppositions to the request for confidential treatment and asked to inspect the submissions pursuant to the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"). These FOIA requests were also served on AMSC. AMSC filed no response to Motorola's request for confidential treatment, nor did it file its own FOIA request or comment on the other participants' FOIA requests.

3. Following an in camera inspection of the materials, OET granted in part the FOIA requests but denied access to those materials that "constitute trade secrets and commercial information and therefore are exempt from disclosure," pursuant to Section 0.457(d) of the Commission's Rules, 47 C.F.R. § 0.457(d), and Exemption 4 of the Freedom of Information Act, 5 U.S.C. § 552 (b)(4). See Letter from David R. Siddall, Chief of the Frequency Allocation Branch of the Federal Communications Commission to Counsel for Ellipsat Corp., TRW Inc., and Constellation Communications, Inc., dated May 4, 1992. As to the exempted materials, OET gave Motorola the following options: (1) withdraw its request for confidentiality and place the materials in the public record; (2) request that the Commission consider the materials in conjunction with Motorola's application subject to a protective order, which would limit public access to the materials; or (3) withdraw the materials from the Commission's consideration. Id.

4. On May 11, 1992, Motorola requested that the Commission issue a protective order that would permit only representatives of the parties in the large LEO proceeding to have access to exempted materials for the limited purpose of commenting on Motorola's application. See Letter of Philip L. Malet, counsel for Motorola, to David R. Siddall, Chief of the Frequency Allocation Branch of the Federal Communications Commission, dated May 11, 1992.¹ The terms of a draft Protective Order were discussed at a meeting on May 22, 1992, held at the Commission. All applicants for licenses in the large LEO proceeding, including AMSC, were invited to attend the meeting, and all of them did so. The Protective Order was issued on May 28, 1992, and thereafter, the materials were made available for inspection under the terms of

¹ Motorola also requested that certain portions of the materials be returned to it and not be considered by the Commission. These materials have been returned to Motorola.

the Protective Order. The Protective Order provides that the other parties to the large LEO proceeding may have access to the Motorola materials only for the purpose of commenting on Motorola's application.

5. Comments regarding the documents were due at the Commission on June 12, 1992. The other applicants filed comments in a timely manner and have not appealed OET's FOIA decision or the Protective Order. On the day comments were due, AMSC filed the instant Application for Review of Protective Order, and an associated Motion for Stay in which AMSC now requests a stay of the June 12th comment deadline² pending resolution of its Application for Review. In its Application for Review, AMSC states that it has not reviewed the protected materials because it fears that to do so would expose it to a future trade secret misappropriation claim by Motorola. AMSC notes that it is in the process of developing its own technology in many of the areas that appear to be the subject of the materials and that it assumes that at least some of the information submitted by Motorola would qualify as trade secrets. AMSC believes that it would be virtually impossible to establish that it had developed the information itself independently of its review of Motorola's materials. For this reason, AMSC claims that the Protective Order effectively denies AMSC access to the Motorola materials and AMSC thus cannot participate fully in the big LEO proceeding. AMSC therefore urges the Commission either to provide for unconditional access to the materials or exclude the materials from consideration in the proceeding.

DECISION

6. At the outset, we observe that AMSC's procedural objection to the Commission's consideration of the Motorola materials is grossly untimely. Although AMSC now asserts that the Protective Order unfairly denies it access to these materials, we note that AMSC interposed no objection to Motorola's original request that the Commission review these submissions entirely in confidence, which would have prevented AMSC from having any access to these materials. Having raised no objection at all to Motorola's request for complete confidentiality, we believe AMSC is not in a position to complain now that it unfairly has been

² We note that this Motion for Stay of the reply comment period on Motorola's confidential materials fails to comply with Section 1.46 of our Rules, which requires such a Motion to be filed no less than seven days before a deadline.

denied the ability to comment on these materials. Furthermore, we note that, unlike the other applicants in the large LEO proceeding³ AMSC also filed no response to Motorola's May 11th letter to the Commission, served on AMSC, which expressly requested that the materials be made available to all parties under a protective order. Rather, AMSC waited until the very last day for reviewing and commenting on the Motorola materials to raise its objections.

7. Nevertheless, we have fully reviewed the merits of AMSC's argument that because it fears a possible trade secret misappropriation suit the Protective Order effectively denies it access to the Motorola materials. We find this claim to be without merit. As Motorola points out, the terms of the Protective Order explicitly provide that restrictions on the use of the information "shall not preclude the use of any material or information in the public domain or which has been developed independently by any other person." Protective Order, para. 5. Thus, the Protective Order specifically recognizes that the applicants examining the materials may develop similar technologies and expressly permits them to use such independently developed information. Such clauses are a standard provision in protective orders and are designed to ensure that parties, like AMSC, who are subject to a protective order are not prevented in any way from utilizing their own technological products or inventions. We therefore conclude that the Protective Order adequately addresses AMSC's concerns.⁴

3 See Letter of Norman P. Leventhal and Raul R. Rodriguez, Counsel for TRW Inc. to David R. Siddall, Chief of the Frequency Allocations Branch, Office of Engineering and Technology, Federal Communications Commission, dated May 18, 1992; Letter of Linda K. Smith, Robert M. Halperin, and William D. Wallace, Counsel for Loral Qualcomm Satellite Services, Inc. to David R. Siddall, Chief of the Frequency Allocations Branch, Office of Engineering and Technology, Federal Communications Commission, dated May 18, 1992; Letter of Jill Abeshouse Stern, Counsel for Ellipsat Corporation to David R. Siddall, Chief of the Frequency Allocations Branch, Office of Engineering and Technology, Federal Communications Commission, dated May 18, 1992; Letter of Robert A. Mazer, Counsel for Constellation Communications, Inc. to David R. Siddall, Chief of the Frequency Allocations Branch, Office of Engineering and Technology, Federal Communications Commission, dated May 18, 1992.

4 In its Reply, AMSC indicates that its concern is not merely with its ability to defend a trade secret misappropriation lawsuit, but specifically with a shift in burden of proof, which,

8. The Protective Order also expressly provides that outside experts may review the confidential materials, so that AMSC could have hired persons outside its firm to assist its counsel in reviewing the materials. Protective Order, para. 4. By this means, AMSC could have completely shielded its technical personnel from access to the documents and thereby further avoided possible questions concerning whether AMSC officials have misappropriated Motorola's trade secrets.⁵

9. Finally, we note that none of the other applicants, who appear to be situated no differently than AMSC, and who have already filed comments on the protected materials, have raised similar concerns.⁶ In these circumstances, we think that AMSC's contention that the Protective Order prevents it from commenting on these materials is unfounded. Rather, the Protective Order appears to have been a reasonable means to accommodate Motorola's need to safeguard its confidential information, while preserving the other applicants' ability to comment on these materials.⁷ In

according to AMSC, "occurs the moment AMSC reviews the material." AMSC Reply, at 2. We note that regardless of whether the burden of proof is shifted, the likelihood of lawsuit is speculative, and any asserted difficulty in defending such a lawsuit is even more speculative. AMSC's highly speculative concerns simply do not outweigh Motorola's immediate and real need for confidentiality.

5 The statement of AMSC's Chief Scientist that all qualified outside technical consultants either already work for AMSC or are likely to work for AMSC in the future is contrary to the experience of the Commission. There are numerous qualified individuals who are expert in satellite technology.

6 AMSC contends that it is in a different position than the other applicants in the large LEO proceeding because it holds an FCC authorization for an MSS system. AMSC Reply, at 2-3. We disagree. Several of the other applicants appear to be at about the same stage of technological development as AMSC. AMSC's co-applicants all have applications pending for some portion of the frequencies at issue in this docket and none has a license to operate.

7 Although in some instances the Commission has determined that confidential materials at issue in FCC proceedings should be placed in the public record, in other cases the Commission has

light of our determination, we will allow AMSC to file comments on the Motorola materials, subject to the terms of the Protective Order, on or before August 3, 1992.⁸

concluded that issuance of a protective order also is a reasonable means to accommodate the parties' competing interests. Compare Amaturo Group, Inc., 39 RR2d (1976) with GTE Corp., 53 RR2d 365 (1983) and MCI Telecommunications Corp., 58 RR2d 187 (1985).

As to AMSC's general concern that protective orders should not be utilized in pioneer preference proceedings, we note that OET has declined to grant confidentiality requests and issue protective orders "as a routine matter" in pioneer preference proceedings. OET has explained that the routine use of protective orders "would result in a significant new burden upon our staff and delay the completion of such proceedings [and] in turn, would undermine the Commission's purpose in establishing a pioneer's preference licensing scheme to make available to the American public new, innovative technologies and services within the shortest period of time." See Letter of Thomas P. Stanley, Chief Engineer, Federal Communications Commission, to Jay L. Birnbaum, Counsel to Echo Group L.P., dated June 3, 1992.

8 In its Application for Review, AMSC also suggests that OET did not adequately support its May 4, 1992 letter, which denied in part the FOIA requests of Ellipsat, Constellation and TRW. AMSC does not have standing to appeal these FOIA decisions, see 47 C.F.R. §0.461 (h)(2), and, moreover, did not pursue a timely appeal of those decisions. See 47 C.F.R. §0.461 (h)(2). We thus do not review herein the merits of the OET determination that the Motorola materials are within the ambit of Exemption 4 of the FOIA. We note, however, that to the extent the OET decision was based on the status of the materials as Exemption 4 trade secrets, the analysis suggested by AMSC to determine the "confidentiality" of the materials under Exemption 4, including both the "impairment" and "competitive harm" aspects of that analysis, is not applicable. We further note that, in FOIA proceedings, the Commission is not required to set forth at the administrative level all of its reasons for withholding the requested materials. Any appeal of such FOIA decisions is a de novo proceeding in federal district court, in which the agency may raise new arguments and exemptions in support of its decision. Finally, contrary to AMSC's contention, agency decisions to disclose Exemption 4 materials are not governed (or authorized) by the FOIA. See Chrysler Corp. v. Brown, 441 U.S. 281 (1979).

10. Accordingly, for the foregoing reasons, IT IS ORDERED, that the Application for Review IS DENIED and the Motion For Stay IS DISMISSED AS MOOT.

11. IT IS FURTHER ORDERED that AMSC may file comments regarding the materials covered by the Protective Order, DA 92-674, FOIA Control Nos. 92-83, 92-88, 92-86 (May 28, 1992), on or before August 3, 1992.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Donna R. Searcy *urc*
Secretary